ORAL ARGUMENT SCHEDULED FOR FEBRUARY 10, 2009

No. 08-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD UNION,
and
NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION,
Petitioners.

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Labor Relations Board Union and the National Labor Relations Board Professional Association (unions) and National Labor Relations Board (Board). The unions are the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's decision in *National Labor Relations Board Union and National Labor Relations Board Professional Association,* Case No. 0-NG-2812, decision issued on May 8, 2008, reported at 62 F.L.R.A. 397.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

Authority or FLRA	Federal Labor Relations Authority
Baldwin County	*Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984)
BATF v. FLRA	*Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983)
Board	National Labor Relations Board
Br.	Brief
Case Control	Case Control and Legal Publications Office
Climax Molybdenum	*Climax Molybdenum* Co. v. Se'y of Labor, 703 F.2d 447 (10th Cir. 1983)
Commerce	*United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993)
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
FLRA	Federal Labor Relations Authority
Green County	*Green County Mobile Phone, Inc. v. F.C.C.*, 765 F.2d 235 (D.C. Cir. 1985)
Hooper	*Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150 (D.C. Cir. 1988)
JA	Joint Appendix
Mountain States	*Mountain States Tel. and Tel. Co.*, 939 F.2d 1021 (D.C. Cir. 1991)

GLOSSARY
(Continued)

Mountain Solutions	*Mountain Solutions, Ltd. Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999)
NAGE	*NAGE Local R1-203*, 55 F.L.R.A. 1081 (1999)
NFFE	*NFFE, Local 1167 v. FLRA*, 681 F.2d 886 (D.C. Cir. 1982)
SOP	Statement of Position
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Tinker AFB	*Tinker Air Force Base v. FLRA*, 321 F.3d 1242 (10th Cir. 2002)
Unions	National Labor Relations Board Union and National Labor Relations Board Professional Association
Washington Star	NLRB v. *Washington Star*, 732 F.2d 974 (D.C. Cir. 1984)

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority ("Authority" or "FLRA") issued the decision and order under review in this case on May 8, 2008. The decision and order is published at 62 F.L.R.A. 397 and is included in the Joint Appendix (JA) at

JA __.[1] The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) (Statute).[2] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

1. Whether the Authority reasonably denied the unions' request for a waiver of an expired time limit.

2. Whether the Authority reasonably determined that the unions' proposals were outside the agency-employer's obligation to bargain.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding brought under § 7117 of the Statute. The National Labor Relations Board Union and the National Labor Relations Board Professional Association (collectively "the unions") sought to bargain with the National Labor Relations Board (Board) over the procedures the Board will follow when investigating formal equal employment opportunity (EEO) complaints. As relevant here, the Board declared five of the union's bargaining

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[1] A deferred appendix will be filed in this case.

[2] Pertinent statutory and regulatory provisions are set forth in the Addendum to this brief.

proposals to be outside its obligation to bargain, and the unions appealed the declarations to the Authority.

By Order dated April 29, 2005, the Authority's Director, Case Control and Legal Publications Office (Case Control), held that the unions' response to the Board's Statement of Position (SOP) was filed untimely and hence would not be considered by the Authority. The unions filed a timely request for reconsideration of the Director's Order.

In the Decision and Order under review, the Authority first denied the unions' request for reconsideration. The Authority then ruled on the merits of the negotiability dispute. Considering only those arguments contained in the unions' initial petition for review and the Board's SOP, the Authority held that all the disputed proposals were outside the Board's obligation to bargain.

The unions now seek review of this decision.

STATEMENT OF THE FACTS

A. The Negotiability Process

1. Negotiability Procedure

Because this case focuses on the procedural requirements when the Authority resolves negotiability disputes, a background discussion of that procedure is appropriate. Negotiability cases are processed pursuant to Part 2424

of the Authority's regulations, 5 C.F.R. Part 2424 (2008). Negotiability disputes are triggered when an employer-agency declares that bargaining proposals are outside the agency's statutory obligation to bargain. When a union has received a written declaration from the agency that a proposal is outside the obligation to bargain, the union may file a petition for review with the Authority. 5 U.S.C. § 7117(c)(1); 5 C.F.R. § 2424.21. The purpose of a union's petition for review is to initiate a negotiability proceeding, and provide the agency with notice that the union requests a decision from the Authority as to whether the proposal at issue is within the agency's obligation to bargain. 5 C.F.R. § 2424.22(a). In the initial petition, the union must identify the proposals at issue and provide the Authority with certain background information regarding the dispute. 5 C.F.R. § 2424.22(b).

After a post-petition conference between the parties to the dispute and a representative of the Authority, the agency is required to file its SOP. 5 U.S.C. 7117(c)(3); 5 C.F.R. §§ 2424.23, 2424.24. Among other things, the SOP must set forth the agency's arguments and authorities supporting its contentions that the disputed proposals are outside the obligation to bargain. 5 C.F.R. § 2424.24(c).

Within 15 days after it receives the agency's SOP, the union must file a response. 5 U.S.C. § 7117(c)(4); 5 C.F.R. § 2424.25(b). The purpose of the response is to inform the Authority and the agency why the disputed proposals are

within the agency's obligation to bargain, *i.e.*, that the proposals do not conflict with any law, do not affect any of the reserved management rights under § 7106(a) of the Statute, or if they do affect a management right, that the proposals fall within one of the exceptions found in § 7106(b). 5 C.F.R. § 2424.25(a). The union must provide argument and authorities supporting its position. 5 C.F.R. § 2424.25(c)(1).

2. General Filing Requirements

The Authority's requirements for the filing of documents are found at §§ 2429.21-2429.28 of its regulations, 5 C.F.R §§ 2429.21-2429.28. All documents must be "filed in person, by commercial delivery, by first-class mail, or by certified mail."[3] 5 C.F.R. § 2429.24(e). Section 2429.21(b) provides that when documents are filed by mail, the date of filing shall be determined by the date of mailing indicated by the United States Postal Service postmark date. 5 C.F.R. § 2429.21(b). However, if the delivery is by personal or commercial delivery, it shall be considered filed on the date received by the Authority or any officer designated to receive such materials. *Id.*

[3] Section 2429.24(e) also provides that certain specified documents may be filed by facsimile. However, the documents at issue here are not among those eligible for filing by facsimile.

B. Procedural History

This case arose out of collective bargaining negotiations between the Board and the unions over procedures the Board would use in investigating complaints of discrimination. During the course of these negotiations, the Board declared certain of the unions' bargaining proposals to be outside the Board's obligation to bargain under the Statute. On January 7, 2005, the unions filed a timely negotiability appeal with the Authority.

In accordance with the Authority's regulations, the Board timely filed its SOP on March 4, 2005. Certified Index at 3. Accordingly, the unions' response was to be filed by March 21, 2005. Pursuant to an order granting a 21-day extension of time, the unions were to file their response no later than April 11, 2005. *Id.* at 7 The unions placed their response in the hands of a commercial delivery service (FedEx) on April 11, 2005. Order dated April 19, 2005. The Authority received the response on April 12, 2005. *Id.*

On April 14, 2005, the Authority's Director of Case Control issued an Order to Show Cause requiring the unions to show cause why the response should be accepted for consideration by the Authority. The Order noted that the response was to be filed by April 11, 2005, but was filed with the Authority by commercial delivery on April 12, 2005. Section 2429.21(b) specifically provides that if service

is by commercial delivery, it shall be considered filed on the date it is received by the Authority. Order to Show Cause at 1-2.

In their response to the Order to Show Cause, the unions conceded that the document was untimely filed, but contended that the failure was inadvertent, resulting from a misreading of the Authority's regulations. The unions also argued that there was no prejudice to any party because the document was promptly delivered to the Authority and the parties on the April 12, 2005. Order dated April 19, 2005.

By Order dated April 29, 2005, the Authority, through its Director of Case Control, found that the unions' response was untimely and that the unions had not shown that there were extraordinary circumstances that would warrant waiving the time limit.[4] In so holding, the Director stated that parties filing documents with the Authority are responsible for being knowledgeable of the statutory and regulatory requirements. The Director also noted that the Authority strictly enforces its regulations concerning timely filing of documents. Accordingly, the Director concluded that the Authority would not consider the unions' response. Order dated April 19, 2008.

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[4] Section 2429.23(b) of the Authority's regulations provides for the waiver of an expired time limit in "extraordinary circumstances." 5 C.F.R. § 2429.23(b)

C. The Authority's Decision

1. The Unions' Motion to Reconsider

The Authority first denied the unions' motion to reconsider the previous denial of the request for a waiver of the expired time limits.[5] On reconsideration, the unions asked the Authority to consider the difficulty the unions' counsel had experienced with serving Federal agencies by mail, and their counsel's intent in seeking timely service upon the Authority. The unions also noted that other agencies, as well as the federal courts, consider a pleading deposited with an overnight commercial delivery service to be served on the date it is deposited with the delivery service. Finally, the Unions argued that the late filing should be excused because that mistake did not cause prejudice to any party. 62 F.L.R.A. at 397.

Noting the heavy burden that parties bear in establishing that extraordinary circumstances exist to justify a waiver of expired time limits, the Authority denied the request for reconsideration. The Authority stated that it had previously found that where documents were filed one day late by commercial delivery (FedEx),

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[5] The Authority has delegated the authority to make determinations with respect to the timeliness of filings to the Director of Case Control. The Authority has retained the authority to review those determinations on requests for reconsideration filed pursuant to § 2429.17 of the Authority's regulations, 5 C.F.R. § 2429.17.

there were no extraordinary circumstances warranting waiver of the expired deadline (citing, *e.g.*, *NTEU*, 60 F.L.R.A. 226, 226 n.1 (2004)). The Authority also cited precedent holding that a simple mistake in filing does not constitute a basis for a waiver of an expired time limit (citing *AFSCME, Local 3870*, 50 F.L.R.A. 445, 448 (1995)). Finally, the Authority noted that it had previously rejected an assertion that lack of prejudice to the proceedings or harm to the other party constituted extraordinary circumstances warranting waiver of the expired deadline (citing *NTEU*, 60 F.L.R.A. at 226 n.1). 62 F.L.R.A. at 398.

Accordingly, the Authority denied the unions' motion and, therefore, did not consider the arguments set forth in the unions' response. *Id.*

2. The Negotiability Determination

Considering only the unions' petition for review, the record of the post-petition conference, and the Board's SOP, the Authority considered whether the disputed proposals were within the Board's obligation to bargain. The Authority first noted that the unions' petition for review stated that the disputed proposals merely required that the Board comply with the requirements of the Equal Employment Opportunity Commission (EEOC) as set forth at 29 C.F.R. Part 1614 and in EEOC Management Directive (MD)-110. In that regard, the Authority noted that the exercise of management's rights under § 7106(a)(2) is limited by

"applicable laws" and that proposals that require an agency to exercise its management's rights in accordance with applicable laws do not interfere with such rights, and are within the duty to bargain (citing *NTEU*, 42 F.L.R.A. 377, 388-91 (1991), *enforcement denied on other grounds*, 966 F.2d 1246 (D.C. Cir. 1993)). Further, the Authority stated that under its precedent, an agency regulation may constitute an "applicable law" where that regulation has "the force and effect of law" (citing *NTEU*, 42 F.L.R.A. at 391).[6] 62 F.L.R.A. at 401-402.

However, the Authority held that the unions had failed to raise any "applicable laws" arguments to support the negotiability of their proposals. In this regard, the Authority found that the unions did not explicitly argue that 29 C.F.R. Part 1614 and MD-110 constitute "applicable laws" within the meaning of § 7106(a)(2), nor did the unions explicitly assert that compliance with 29 C.F.R. Part 1614 and MD-110 was grounds for finding the proposals negotiable. Accordingly, the Authority did not consider whether compliance with 29 C.F.R. Part 1614 or MD-110 rendered the proposals negotiable. In so doing, the

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[6] Regulations are found to have the force and effect of law where they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any procedural requirements imposed by Congress. *See United States Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 F.L.R.A. 687, 690 (1999).

Authority relied on § 2424.25(c)(1) of its regulations which requires that unions set forth in their pleadings:

> the arguments and authorities supporting any assertion that [a] proposal . . . does not affect a management right under 5 U.S.C. [§] 7106(a), and any assertion that an exception to management rights applies, including . . . [w]hether and why the proposal . . . enforces an 'applicable law,' within the meaning of 5 U.S.C [§] 7106(a)(2).

5 C.F.R. § 2424.25(c)(1)(iv). 62 F.L.R.A. at 401-402.

Moreover, the Authority stated that even if it were to construe the unions' claim as an assertion that 29 C.F.R. Part 1614 and MD-110 constitute applicable laws, such a claim would amount to nothing more that a bare assertion unsupported by arguments and authorities. Accordingly, and citing *AFGE, Local 1827*, 58 F.L.R.A. 344, 353 (2003), the Authority rejected any contention that the proposals merely require the agency to comply with an applicable law. 62 F.L.R.A. at 402.

Finally, the Authority considered the Board's contention that the disputed proposals impermissibly interfere with the Board's reserved management rights under § 7106(a) of the Statute. Noting that the unions had made no more than a general statement that the proposals concern procedures and that the unions presented absolutely no argument or authority to support this bare assertion, the

Authority declined to address it (citing *AFSCME, Local 2830*, 60 F.L.R.A. 124, 127 (2004)). 62 F.L.R.A. at 402-03.

Finally, stating that apart from this bare assertion, the unions did not otherwise dispute the Agency's assertions that the proposals are outside the duty to bargain, the Authority concluded that all of the disputed proposals are outside the duty to bargain. 62 F.L.R.A. at 403.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *BATF v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). As such, "the Authority is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF v. FLRA*, 464 U.S. at 97 (citation omitted).

Furthermore, administrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules. *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1021, 1034-35 (D.C. Cir. 1991) (*Mountain States*) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)); *see also Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (*Climax Molybdenum*) (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). As relevant here, agency determinations not to waive procedural requirements will be reversed only when the agency has abused its discretion. *Green Country Mobile Phone, Inc. v. F.C.C.*, 765 F.2d 235, 238 (D.C. Cir. 1985) (*Green Country*). The burden to show an abuse of discretion "is a heavy one," and only where an agency has inconsistently applied a procedural rule will a reviewing court find that an agency abused its discretion in such matters. *Id.; see also Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150, 1151 n.2 (D.C. Cir. 1988) (agency may enforce a rule as strictly as it pleases as long as it does so uniformly) (*Hooper*); *Tinker Air Force Base* v. *FLRA*, 321 F.3d 1242, 1246 (10th Cir. 2002) (*Tinker AFB*) (upholding Authority's strict application of its filing requirements).

With regard to a negotiability decision, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ.*

Ass'n v. FLRA, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *NTEU v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

1. The Authority did not abuse its discretion when it denied the unions' request to waive an expired time limit. The burden of establishing that an administrative agency has abused its discretion in denying a waiver of its procedural rules is a heavy one, and an agency's strict, but consistent, application of its rules is insufficient to establish such an abuse. Here, the unions cite no appellate cases where a similar administrative determination has been reversed, nor any case where the Authority has waived a time limit under similar circumstances. To the contrary, the Authority has consistently applied its time limits in a strict manner.

In addition, the unions point to no other reasons for holding that the Authority improperly denied the waiver request. First, the fact that under the procedural rules of some other administrative agencies and the federal courts, the union's response might have been deemed as timely filed is unavailing. It is well settled that the formulation and application of procedural rules are left to the discretion of administrative agencies. In that regard, it is undisputed that the unions' filing was untimely under the Authority's unambiguous requirements.

Second, the unions mistakenly contend that the length of time it took the Authority to issue a decision in the instant case demonstrates that the Authority abused its discretion by denying the unions' waiver request. However, a delay in issuing a decision does not render an agency decision to enforce strictly a statutory time limit "legally flawed." *NFFE, Local 1167 v. FLRA*, 681 F.2d 886, 892-93 (D.C. Cir. 1981) (*NFFE*).

Finally, although the unions contend that there would be no prejudice to other parties if the time limits were waived in this case, lack of prejudice is a factor in waiving procedural requirements only when other mitigating factors are present. As no other reason for waiving the Authority's procedural requirements has been demonstrated, the unions clearly have not met their burden of establishing an abuse of discretion by the Authority.

2. The unions mistakenly contend that, even in the absence of timely filed arguments or authorities supporting the negotiability of the proposals, the Authority should have conducted an independent negotiability analysis. In addition, the unions contend that the Authority's failure to do so in the instant case is an unexplained departure from precedent. The unions' contentions are without merit.

In the first place, the unions' contentions are not properly before the Court because they were not raised before the Authority. No objection that has not been urged before the Authority shall be considered by a court of appeals on review. 5 U.S.C. § 7123(c). Section 7123(c)'s requirements are no less applicable where, as here, a party's first opportunity to raise the matter before the Authority would be in a motion for reconsideration. The unions had the opportunity to raise the issue before the Authority in a motion for reconsideration, and their failure to do so deprives this Court of jurisdiction to consider it.

Further, and in any event, the Authority did not depart from its precedent by not conducting an independent negotiability analysis in the absence of argument and supporting authorities from the unions. The Authority's regulations clearly place the burden of producing arguments and supporting authorities on the parties, and make clear that a party's failure to respond to arguments or assertions raised by the other party may be deemed a concession to such arguments and assertions. The Authority has applied these regulations in a consistent manner since their effective date. Finally, this Court has recognized that it is the responsibility of the parties to create the record upon which the Authority can resolve a negotiability dispute. *NFFE*, 681 F.2d at 891.

For all these reasons, unions' petition for review should be denied.

ARGUMENT

I. THE AUTHORITY REASONABLY DENIED THE UNIONS' REQUEST FOR A WAIVER OF AN EXPIRED TIME LIMIT

It is not disputed that the unions filed their response out of time. The Authority's regulations clearly state that documents served by commercial delivery are deemed filed when received by the Authority. 5 C.F.R. § 2429.21(b). Therefore, the only question before this court is whether the Authority abused its discretion when it denied the unions' request for a waiver of the expired time limit. As will be demonstrated below, the Authority did not abuse its discretion because it applied its clear procedural requirements in a manner consistent with its uniform past practice.

It is well established that, in this context, the burden to show an abuse of discretion "is a heavy one." *Green Country,* 765 F.2d at 238. In that regard, reviewing courts will not overturn an agency's strict application of its own procedural regulations so long as the rule is applied uniformly or with reasoned distinctions. *Tinker AFB*, 321 F.3d at 1246; *Green Country,* 765 F.2d at 237; *Hooper*, 841 F.2d at 1151 n.2; *Gilbert v. NTSB*, 80 F.3d 363, 367 (9th Cir. 1996). Further, standing alone, an agency's strict construction of a procedural rule in the face of a waiver request is insufficient evidence of an abuse of discretion. *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999)

(citations omitted) (*Mountain Solutions*) (holding Commission's denial of a requested waiver of time limit was not an abuse of discretion).

The unions do not, nor could they, contend that the Authority does not apply its procedural rules generally, and its rules on timeliness particularly, in a uniformly strict manner. In that regard, the unions have not cited a single case where the Authority has waived the time limit under circumstances similar to those present in this case. To the contrary, the Authority consistently and uniformly requires strict adherence to filing deadlines. *See, e.g.*, *United States Dep't of Agric., Farm Serv. Agency, Kansas City, Mo. and United States Dep't of Agric., Office of the Inspector Gen., Kansas City, Mo.*, 55 F.L.R.A. 22, 23-24 (1998) (one-day delay caused by agency's internal mail system did not excuse untimely filings); *Dep't of Justice, United States Immigration and Naturalization Serv., United States Border Patrol, El Paso, Tex*, 40 F.L.R.A. 792, 793 (1991) (agency exceptions found in Authority's Case Control Office the morning after the due date without evidence of timely delivery were untimely); *United States Dep't of the Treasury, Customs Serv., Washington D.C.*, 38 F.L.R.A. 875, 877 (1990) (delay caused by courier service procured by the Authority's General Counsel did not excuse untimely filing). Moreover, that the Authority has applied its procedural rules in a

uniform manner has been recognized by at least one court of appeals. *See Tinker AFB*, 321 F.3d at 1246.

Additionally, the Authority has consistently denied waivers in circumstances substantially identical to those found here, *i.e.*, where a document was deposited with a commercial delivery service on the due date, but received by the Authority the next day. *See, e.g.*, *NTEU*, 60 F.L.R.A. at 226 n.1 (agency opposition untimely filed); *United States Dep't of the Treasury, Customs Serv., San Diego Dist., San Diego, Cal.*, 58 F.L.R.A. 240, 241 (2002) (agency exceptions untimely filed); *United States Dep't of the Army, United States Missile Command Redstone Arsenal, Ala.*, 43 F.L.R.A. 1359, 1360 (1992) (grievant's exceptions untimely filed).

In this regard, the unions' attempt (Br. 20) to distinguish *Marine Eng'rs Beneficial Ass'n, Dist. No.1-PCD*, 60 F.L.R.A. 828 (2005) is unavailing. Although the precise circumstances of *Marine Eng'rs* may be different than those present in the instant case, *Marine Eng'rs* remains, nonetheless, another example of the Authority's strict applications of its filing deadlines.[7]

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[7] *Compare NLRB v. Washington Star Co.*, 732 F.2d 974, 975 (D.C. Cir. 1984) (*Washington Star*). In *Washington Star*, the Court recognized that the Board had broad discretion in making and applying its procedural rules, but, nonetheless held that in the specific circumstances of that case the Board arbitrarily refused to

(footnote continued on next page)

The unions' affirmative arguments suggesting that the Authority abused its discretion in denying the waiver request are all without merit. First, although conceding that the Authority has the right to promulgate its regulations prescribing its filing requirements, the unions argue (Br. 17-19) that the Authority's requirements are "antiquated" and out of line with those of similar administrative agencies and the United States Courts of Appeals.[8] The unions' concession answers its own argument. It is well settled that "the formulation of procedures [is] basically left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments." *Mountain States*, 939 F.2d

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accept documents filed one day late. 732 F.2d at 976-77. However, *Washington Star* is readily distinguishable from the instant case.

The D.C. Circuit's decision in *Washington Star* was based on two extenuating factors, neither of which is present here. First, the Court found that the Star made good faith, though mistaken, efforts to properly file its exceptions. *Id.* at 975-76. In finding "good faith efforts," the court stated that the Star's misreading of the filing requirements was excusable because it was "a product of the opaque captions and curious wording of the pertinent [Board] regulations." *Id.* at 976 n.1. Here, the unions have not asserted before this Court that the relevant regulations were unclear, nor could they. Second, the *Washington Star* court stressed that the Board had not consistently insisted on strict application of its filing deadlines, occasionally waiving time limits in situations where parties had demonstrated less good faith than had the Star. *Id.* at 977. As demonstrated above, the Authority, on the other hand, has consistently required strict compliance with its filing deadlines.

[8] The unions note that the Merit Systems Protection Board, the EEOC, and the Federal courts treat the date of deposit with a commercial delivery to be the date of filing.

at 1034-35 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)); *see also Climax Molybdenum*, 703 F.2d at 451. Nonetheless, the Authority's procedures with respect to commercial delivery are consistent with those of other administrative agencies. *See e.g.*, 29 C.F.R. § 2200.8(e) (Regulations of the Occupational Safety and Health Review Commission provide that "filing is effective upon mailing, if by mail, upon receipt by the Commission if filing is by . . . overnight delivery service[.]"); 17 C.F.R. § 201.150(d) (Rules of Practice of the Securities and Exchange Commission provide that service by a commercial courier or express delivery service is complete upon delivery, while service by mail is complete upon mailing.).

The unions also suggest that a waiver should have been granted because the untimely filing caused no prejudice to any party to the proceeding. However, the Authority has specifically found that absence of prejudice is an insufficient basis to establish the extraordinary circumstances necessary to grant a waiver of expired time limits. *AFGE, Local 1668*, 50 F.L.R.A. 124, 124 n.1 (1995); *see also NTEU*, 60 F.L.R.A. at 226, n.1; *EEOC, Washington, D.C.*, 53 F.L.R.A. 487, 501 (1997) (citing *Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 152 (1984) (*Baldwin County*)).

The Authority's holdings in this regard are consistent with well established judicial principles. *See, e.g., Baldwin County,* 466 U.S. at 152 ("Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."); *Dougherty v. Barry*, 869 F.2d 605, 613 (D.C. Cir. 1984) ("lack of prejudice . . . should enter the calculus only if another factor first provides the essential underpinning for equitable tolling"). As the Sixth Circuit has held, in order to justify tolling or waiving time limits, "we [must] look beyond the absence of prejudice[.]" *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988); *see also Kelley v. NLRB*, 79 F.3d 1238, 1250 (1st Cir. 1996).[9]

For all these reasons, the Authority reasonably denied the unions' request for a waiver of the expired time limits. The Authority's determination was not an abuse of discretion. *Mountain Solutions*, 197 F.3d at 517 (holding that an agency's strict construction of a procedural rule in the face of a waiver request is insufficient

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[9] The unions contend (Br. 16-17) that they used a commercial delivery service, rather than the Postal Service, because of difficulties in mail deliveries to federal agencies caused by heightened security measures. However, the unions could have achieved their purpose and still complied with the Authority's regulations simply by depositing the response with the delivery service one day earlier. In that regard, the unions had been previously granted a 21-day extension of time to file their response, giving them a total of 36 days in which prepare and file their response.

evidence of an abuse of discretion). Accordingly, the Authority's ruling on the unions' waiver request should be upheld.[10]

II. THE AUTHORITY REASONABLY DETERMINED THAT THE UNIONS' PROPOSALS WERE OUTSIDE THE AGENCY-EMPLOYER'S OBLIGATION TO BARGAIN

Based upon the record before it, the Authority reasonably held that the disputed proposals were outside the Board's obligation to bargain. Relying explicitly on its regulations and precedent, and noting that the unions had not filed a timely response to the Board's SOP, the Authority considered only the unions' Petition for Review, the record of the post petition conference, and the Board's SOP in its analysis. As the unions presented no arguments in a timely manner contesting the Board's claim that the proposals interfered with the Board's reserved rights under § 7106(a) of the Statute, nor any other argument or authority that the

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[10] The unions also argue that the denial of the waiver was an abuse of discretion because the Authority unreasonably delayed issuing a decision. Although the delay may be unfortunate, it does not render the Authority's determination legally flawed. *NFFE, Local 1167 v. FLRA*, 681 F.2d 886, 892-93 (D.C. Cir. 1982) (holding that Authority properly refused to consider a party's untimely filing despite the Authority's considerable delay in issuing its decision). Although Congress established specific time limits for the submission of filings in negotiability cases, no such time limits are imposed on the Authority's decision making process in negotiability cases. 5 U.S.C. § 7117(c); *Compare* 5 U.S.C. § 7105(f) (requiring Authority to act within 60 days on petitions for review of actions taken pursuant to delegations to Regional Directors or Administrative Law Judges)

proposals were within the obligation to bargain, the Authority reasonably held that the proposals were nonnegotiable.

The unions do not deny that they provided neither argument nor authorities that would support the negotiability of the proposals in their Petition for Review. Rather, they contend that the Authority should have conducted an independent negotiability analysis and that this failure was an unexplained departure from precedent. The unions' contentions in this regard are without merit. First, the contention is not properly before this Court, because it was not first presented to the Authority. *See* 5 U.S.C. § 7123(c). Second, and in any event, the Authority's analysis in this case was not a departure from its precedent.

A. The Unions' Contention is not Properly Before this Court

Section 7123 of the Statute provides that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986). Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision,

are not within the Court's jurisdiction to consider. *See, e.g., United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 244-45 (D.C. Cir. 1993) (*Commerce*).

The unions' contention that the Authority departed from precedent by not conducting an independent negotiability analysis should have been made to the Authority in the first instance. Section 7123(c)'s requirements are no less applicable where, as here, a party's first opportunity to raise the matter before the Authority would be in a motion for reconsideration. *Commerce*, 7 F.3d at 245. Interpreting 29 U.S.C. § 160(e), a substantially identical provision in the National Labor Relations Act (NLRA), the Supreme Court held that "when the NLRB raises and resolves an issue *sua sponte*, a party seeking judicial review of that issue must first file a motion for reconsideration . . . ." *Woelke & Romero Framing, Inc. v. Nat'l Labor Relations Bd., et al.*, 456 U.S. 645, 665 (1982); *see also Commerce*, 7 F.3d at 245; *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004). Requiring a party to raise an issue before the Authority, even if the first opportunity to do so is on a request for reconsideration, provides the Authority notice of the objection and an opportunity to correct the alleged error. *See W&M Properties of Conn., Inc.*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (holding that under 29 U.S.C. § 160(e) a party must raise an objection to a Board-imposed

remedy to the Board on a request for reconsideration before raising it before the court of appeals).

Similarly here, the unions were required to raise their contention that the Authority departed from its precedent before the Authority in the first instance. The unions had the opportunity to do so in a motion for reconsideration. Because they did not, the matter is not properly before the Court.

B. The Authority Did Not Depart From its Precedent

Contrary to the unions' contentions, the Authority did not depart from its precedent by not conducting an independent negotiability analysis in the absence of argument and supporting authorities from the unions. As demonstrated below, the Authority's regulations clearly place the burden of producing arguments and supporting authorities on the parties, and the Authority has applied these regulations in a consistent manner. Further, this Court has recognized that it is the responsibility of the parties to create the record upon which the Authority can resolve a negotiability dispute.

1. The Authority's Regulations

In 1998, the Authority proposed regulations intended to expedite the processing of negotiability cases, and to clarify the issues to be resolved and the responsibilities of each party. 63 Fed. Reg. 48,130 (Sept. 9, 1998). As relevant

here, the proposed regulations specifically required unions to respond to the allegations of nonnegotiability and provide support for their assertions. Thus, the proposed regulations stated that a failure to address an assertion or argument made in an agency's SOP might result in the Authority's refusal to consider an argument or could be deemed a concession. 63 Fed. Reg. at 48,133.

After receiving comments from the public, the Authority issued its final regulations governing negotiability proceedings on December 2, 1998. 63 Fed. Reg. 66,405 (Dec. 2, 1998). As the Authority noted in its analysis of the final rules, unions are "responsible for raising and supporting arguments that, among other things, a proposal or provision is within the duty to bargain or not contrary to law[.]" 63 Fed. Reg. at 66,411. The Authority also stated that, under the final rules, a failure to raise and support arguments "will, where appropriate, be deemed a waiver of such arguments," and a failure to respond to arguments "will, where appropriate, be deemed a concession to such arguments or assertions." *Id.*

The 1998 revisions remain in effect. Section 2424.25(a) specifically requires that the union's response state "why, despite the agency's arguments in its [SOP], the proposal or provision is within the duty to bargain[.]" 5 C.F.R. § 2424.25(a). More specifically, § 2424.25(a) provides that the union must state why the proposal "does not conflict with any law, or why it falls within an

exception to management rights[.]" *Id.* Furthermore, § 2424.25(c) provides that the union's response must include "[a]ny disagreement with the agency's . . . negotiability claims" and "must state the arguments and authorities supporting its opposition to any agency argument." 5 C.F.R. 2424.25(c).

The consequences of any party's failure to raise, support, or respond to arguments are found at 5 C.F.R. § 2424.32(c).[11] Specifically, a "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument." 5 C.F.R. 2424.32(c)(1). Further, the "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion." 5 C.F.R. § 2424.32(c)(2).

To the extent that, prior to the effective date of the revised procedures, the Authority may have conducted *sua sponte* negotiability analyses, independent from arguments and assertions of the parties, the Authority clarified and explained the burdens of the parties and the consequences of failing to meet those burdens when it promulgated, through public notice and comment, those revisions.[12]

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[11] The sanctions provided in § 2424.32 apply to both agencies and unions. The substantive requirements applicable to agency SOPs and replies are found at §§ 2424.24 and 2424.26, respectively.

[12] The Authority does not concede that it had an established practice of *sua sponte* negotiability analyses prior to 1998. *See NFFE, Local 1167 v. FLRA*, 681 F.2d

(footnote continued on next page)

Accordingly, the unions cannot reasonably claim that they were unaware of their burden to respond to the agency's arguments and assertions and to support their position with argument and authorities.

2. Authority Precedent

Since the effective date of the revised regulations, the Authority has consistently required parties to meet their burdens of raising, supporting, and responding to arguments in negotiability cases.[13] *See, e.g.*, *AFGE, Local 1712*, 62 F.L.R.A. 15, 16 (2007) (agency contentions deemed conceded where union failed to file response); *IFPTE, Local 29*, 61 F.L.R.A. 382, 384 (2005) (agency contentions deemed uncontested where union's response not properly filed); *NATCA*, 61 F.L.R.A. 336, 339 (2005) (union's contention that proposals were negotiable procedures deemed conceded where agency failed to file a reply);

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886 (D.C. Cir. 1982) (reviewing a case where the Authority accepted agency assertions as uncontroverted in absence of timely filed union response). In that regard, the unions rely on a single case, *NAGE, Local R1-203*, 55 F.L.R.A. 1081 (1999), processed under the pre-1998 regulations, 55 F.L.R.A. at 1081 n.2, to support its contention that the Authority had such a practice. Br. 24. In its decision on review (62 F.L.R.A. at 402 n. 10), the Authority acknowledged that *NAGE* might be read to imply that the Authority will undertake an applicable law analysis even when the parties fail to properly raise the issue. But the Authority clarified its position that after the regulatory revisions, it has not and will not do so. 62 F.L.R.A. at 402 n. 10.

[13] The revised regulations were applicable to all petitions for review filed after April 1, 1999. 5 C.F.R. § 2424.1.

NTEU, 60 F.L.R.A. 219, 222 (2004) (union lack of response to particular agency contention deemed concession); *IFPTE, Local 96*, 56 F.L.R.A. 1033, 1034 (2000) (agency contentions deemed conceded where union failed to file response).

As noted above (p. 28, n. 12), the union has cited only a single case, *NAGE*, in its attempt to establish that the Authority had an established practice of "undertaking its own analysis of the negotiability of proposals instead of relying only on the analysis presented by the parties." Br. 24. However, as the Authority noted (62 F.L.R.A. at 402 n. 10), that case was decided prior to the 1998 regulatory revisions. In sharp contrast, here, as well as in those cases cited in the previous paragraph, the Authority explicitly relied on the regulatory requirement that the parties raise, respond to, and support arguments on behalf of their positions.[14]

Further, and contrary to the unions' contentions (Br. 25-29), nothing in the Authority's application of §§ 2424.25 and 2424.32 of its regulations affects the value of Authority precedents. As noted above, these provisions only place the burden on the parties to raise, support, and respond to arguments regarding

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[14] Further, and in any event, the union overstates the significance of *NAGE*. In *NAGE*, the Authority only conducted its own analysis regarding the particular question of whether a proposal was intended to enforce an "applicable law" under § 7106(a)(2) of the Statute. *NAGE*, 55 F.L.R.A. at 1086. Nothing in *NAGE* can be reasonably read to imply that the Authority would conduct an independent and free-ranging negotiability analysis in the absence of arguments by the parties.

negotiability. Where arguments are properly raised and supported, the Authority will, as it has in the past, analyze those arguments and apply existing precedent.[15]

3. This Court's Decision in *NFFE, Local 1167 v. FLRA*

The Authority's determination in the instant case is consistent with the precedent of this Court. In *NFFE Local 1167*, 6 F.L.R.A. 574 (1981), the Authority, as here, did not consider an untimely-filed union response to the agency's SOP. On review by this Court, the union did not argue that its response should have been considered. Rather, the union argued "that the [Authority] had an obligation to undertake a substantive independent analysis of the content of the proposals to determine what effect, if any, they had on management rights." *NFFE, Local 1167 v. FLRA*, 681 F.2d at 891 (internal quotations omitted). This Court disagreed. *Id.*

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[15] Nor does the Authority decision on review impact the applicability of *Commander, Carlswell Air Force Base, Texas*, 31 F.L.R.A. 620, 624-625 (1988). *Carlswell AFB* held that where an agency raises a duty to bargain question during impasse resolution proceedings before the Federal Service Impasses Panel (Panel), the Panel may resolve that question where the proposal at issue is substantially identical to a proposal that has previously been addressed by the Authority. *Carlswell AFB* stands for the proposition that the Authority's precedents are intended to provide guidance not only to parties to the bargaining process, but also to third parties such as the Panel and interest arbitrators whose function it is to resolve bargaining impasses. 31 F.L.R.A. at 624. That decision does not support a view that the Authority should address negotiability arguments that a party fails to raise on its own.

The Court held that it is the parties who bear the burden of creating a record sufficient for the Authority to resolve the negotiability dispute. *NFFE*, 681 F.2d at 891. Further, the Court found the parties also have the burden of providing supporting authority for their positions. *Id.* In all, the Court concluded that "[t]he FLRA fully met its procedural obligations in the [ ] case," noting that in the absence of a timely filed response, the Authority could properly accept the agency's uncontroverted assertions. *Id.* There is no obligation for the Authority to supplement the parties' properly filed submissions. *NFFE*, 681 F.2d at 892.

Nothing in this case warrants a different conclusion. The Authority properly relied on the record and assertions properly before it and made its determinations accordingly.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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